

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Florey
Construction, Inc.

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came on for a hearing before Administrative Law Judge Manuel J. Cervantes (ALJ) on May 18, 2010, in a courtroom at the Office of Administrative Hearings (OAH) in St. Paul, pursuant to a Prehearing Order, filed March 29, 2010.

Michael J. Tostengard, Assistant Attorney General, appeared on behalf of the Minnesota Department of Labor and Industry (Department). There was no appearance by, or on behalf of, Respondent Jeffrey A. Florey after oral due notice at a prehearing conference on March 26, 2010 and by U.S. mail at Respondent's last known address. Respondent did not request a continuance or contact the ALJ for other relief. The hearing record closed on May 18, 2010 following the default hearing.

STATEMENT OF THE ISSUES

1. Did Respondent violate Minn. Stat. § 326.84 (7)¹ by failing to use the proceeds from Complainants' payments to pay for work performed by subcontractors on Complainants' project knowing that the material and labor furnished for the improvements by the subcontractors remained unpaid?

2. Did Respondent perform negligently or in breach of contract in violation of Minn. Stat. § 326.84 (4) by failing to complete the contracted work by attempting to install mahogany rather than oak doors as required by contract?

The ALJ concludes that Respondent is in default and recommends that the allegations in the Notice and Order for Prehearing Conference be accepted as true and deemed proven.

The ALJ further concludes there are grounds for the Commissioner of Labor and Industry (Commissioner) to impose a license sanction and it is recommended that a license sanction be imposed.

Based upon the evidence in the hearing record, the ALJ makes the following:

¹ All citations refer to the 2008 version of Minnesota Statutes, unless otherwise noted.

FINDINGS OF FACTS

1. Respondent holds a residential building contractor license issued by the Department on May 23, 2007, license No. 20627705.²

2. On August 4, 2009, the Department opened an investigation based on a complaint submitted by Fridley, Minnesota, residents (Complainants) who hired Respondent on May 6, 2009 to remodel their bathroom. During the course of the remodeling, Respondent constructed an unplumbed privacy wall, installed drywall in a sloppy manner, and bought and stained mahogany doors for the bathroom instead of oak doors which had been contracted for.³

3. Complainants paid Respondent \$12,100 for the work performed. Complainants refused to pay for the mahogany doors because they had to hire someone else to install the correct oak doors.⁴

4. The last payment, in the amount of \$815 to \$2,100, is in dispute. Complainants reported that Respondent owes four subcontractors who also provided labor and materials in the amount of \$3,089.50 to Complainants' home. Specifically, Larson Plumbing is owed \$1,170.50, Todd the cabinet maker is owed \$359, Aldrich Woodworking is owed \$990, and the electrician is owed \$570.⁵

5. On December 10, 2009, the manager of Enforcement Services for the Department issued a Licensing Order which assessed Respondent a \$1,000 monetary penalty based on violations of Minnesota law.⁶

6. Respondent timely requested a contested hearing.⁷

7. On February 2, 2010, a Notice and Order for Prehearing Conference in this matter was mailed to the Respondent's last known address. The Notice and Order for Prehearing Conference indicated that a conference would be held in this matter on March 26, 2010.

8. The Notice and Order for Prehearing Conference in this matter includes the following statement:

Respondent's failure to appear at the hearing or prehearing conference, or any failure to comply with any order of the Administrative Law Judge, may result in a finding that Respondent is in default, that the Department's

² Exhibit A, Licensing Order attached to the Notice and Order for Prehearing Conference.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Ex. B, attached to the Notice and Order for Prehearing Conference.

allegations contained in this Notice and Order may be accepted as true, and its proposed action may be upheld.⁸

9. Respondent appeared at the prehearing conference on March 26, 2010. After a short discussion of the issues with the ALJ, the parties agreed that the matter would be set for a contested hearing on May 18, 2010, at 9:30 a.m., at the Office of Administrative Hearings in St. Paul. The hearing schedule was formalized in a written Scheduling Order. This Order was served by mail upon the parties on March 29, 2010.⁹

10. There was no appearance by, or on behalf of, Respondent at the May 18, 2010 scheduled contested hearing. No prehearing request was made for a continuance, nor was any communication received by the ALJ from Respondent.¹⁰

CONCLUSIONS OF LAW

1. The ALJ and the Commissioner are authorized to consider the allegations against Respondent under Minn. Stat. §§ 14.50 and 326B.82, subd. 7.

2. Respondent was given oral notice at the Prehearing Conference of March 26, 2010 and in writing pursuant to the ALJ's Scheduling Order mailed March 29, 2010 to his last known address of the time and place of the contested hearing. This matter is, therefore, properly before the Commissioner and the ALJ.¹¹

3. Respondent is in default as a result of his failure to appear at the scheduled contested hearing.

4. Pursuant to Minn. R. 1400.6000, a contested case may be decided adversely to a party who defaults. Upon default, the allegations and claims set forth in the original Notice and Order for Prehearing Conference may be taken as true or deemed proved without further evidence.

5. Respondent, as a licensed residential building contractor, must adhere to Minnesota statutes and regulations governing residential building contractors.

6. Minn. Stat. § 326B.082, subd. 1, states,

The commissioner may enforce all applicable law under this section. The commissioner may use any enforcement provision in this section, including the assessment of monetary penalties, against a person required to have a license, registration, certificate, or permit under the applicable law based on conduct that would provide grounds for action against a licensee, registrant, certificate holder, or permit holder

⁸ Notice and Order for Prehearing Conference, at 3.

⁹ See Certificate of Service of D. Collins, dated March 26, 2010.

¹⁰ Respondent failed to comply with other provisions of the Scheduling Order regarding the preparation and exchange of a witness list and exhibits.

¹¹ Minn. R. 1400.5550, subp. 2.

under the applicable law. The use of an enforcement provision in this section shall not preclude the use of any other enforcement provision in this section or otherwise provided by law.

7. Minn. Stat. § 326B.082, subd. 11 (b) (9), authorizes the commissioner to [d]eny, suspend, limit, place conditions on, or revoke a person's permit, license, registration, or certificate, or censure the person holding the permit, license, registration, or certificate, if the commissioner finds that the person:

* * *

performed work in connection with the permit, license, registration, or certificate or conducted the person's affairs in a manner that demonstrates incompetence, untrustworthiness, or financial irresponsibility.

8. Minn. Stat. § 326B.84 (7) (2008), states,

In addition to the grounds set forth in section 326B.082, subdivision 11, the commissioner may deny, suspend, limit, place conditions on, or revoke a license or certificate of exemption, or may censure the person holding the license or certificate of exemption, if the ... licensee:

* * *

has failed to use the proceeds of any payment made to the licensee for the construction of, or any improvement to, residential real estate, as defined in section 326B.802, subdivision 13, for the payment of labor, skill, material, and machinery contributed to the construction or improvement, knowing that the cost of any labor performed, or skill, material, or machinery furnished for the improvement remains unpaid.

9. Respondent failed to use the proceeds from Complainants' payments to pay for the work performed by four subcontractors on Complainants' project and therefore, has violated Minn. Stat. § 326B.84 (7).

10. Minn. Stat. § 326B.84 (4) (2008), states,

In addition to the grounds set forth in section 326B.082, subdivision 11, the commissioner may deny, suspend, limit, place conditions on, or revoke a license or certificate of exemption, or may censure the person holding the license or certificate of exemption, if the ... licensee:

* * *

[h]as performed negligently or in breach of contract, so as to cause injury or harm to the public.

11. Respondent performed negligently or in breach of contract by attempting to install mahogany rather than oak doors, by installing an unplumbed wall, by installing dry wall in sloppy fashion, and by failing to complete the contracted work in violation of Minn. Stat. § 326B.84 (4). The Complainants were harmed when they were required to contract with another to properly install the correct bathroom doors at an additional cost to them.

12. The allegations contained in the Notice and Order for Prehearing Conference are deemed proven.

13. Based upon the facts set forth in the Notice and Order for Prehearing Conference, there is a basis for the imposition of a monetary penalty.

14. The imposition of a monetary penalty against Respondent is in the public interest.

Based upon these Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

It is hereby respectfully Recommended that the Commissioner impose a \$1,000 monetary penalty against Florey Construction, Inc.

Dated: June 9, 2010

s/Manuel J. Cervantes
MANUEL J. CERVANTES
Administrative Law Judge

NOTICE

This report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Labor and Industry will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Nancy Leppink, General Counsel, Department of Labor and Industry, 443 Lafayette Road North, St. Paul, Minnesota 55155 or call the Department at (651) 284-5492 to learn about the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.